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IN THE

Supreme Court of the United States

October Term, 1966.

No. 972.

UNITED STATES OF AMERICA,
Appellant,
v.
PROVIDENT NATIONAL BANK, CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
Appellees.

BRIEF OF APPELLEE BANKS.

QUESTIONS PRESENTED.

Under the Bank Merger Act of 1966, a bank merger may be approved, even though it would otherwise violate the Clayton Act, if the regulatory agency finds, that the anticompetitive effects are clearly outweighed in the public interest by the effects of the merger in meeting the convenience and needs of the community. Once this finding has been made, the merger is immune from attack except during a 30-day period. In any action brought within that period, the court is directed to "review de novo the issues presented" and to apply the identical standards that the banking agencies are directed to apply.

This appeal arises out of an action in the District Court attacking a bank merger approved by the Comptroller of the Currency. The questions presented are:

1. Is the function of the court to review the Comptroller's finding of public interest—as the court below held—or to make its own determination independent of the Comptroller's finding—as the Department of Justice contends?

2. Is the determination of public interest under the Bank Merger Act a legislative function which cannot constitutionally be assigned to a federal court?

3. Does the Department of Justice have the burden of persuading the court that, in the light of the facts as found by the court, the Comptroller has abused, exceeded or arbitrarily applied his discretion?

4. Does the Department of Justice have the burden of coming forward with evidence that any anticompetitive effects are not outweighed by the factors of community convenience and needs relied upon by the Banks and found by the Comptroller to justify the merger?

STATUTE INVOLVED.

The Bank Merger Act of 1966, 80 Stat. 7, (reprinted in full in Banks' Appendix 1b-7b) amends Section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c) to provide that:

(a) No insured bank shall merge with another except with the approval of the responsible agency (Subsection 2).

(b) In deciding whether to approve a merger, the agency shall consider in every case the financial and managerial resources and future prospects of the banks and the convenience and needs of the community to be served (Subsection 5).

(c) The agency shall also request advisory reports from the other banking agencies and the Attorney General as to the competitive factors—but not the community convenience and needs—involved in the merger (Subsection 4).

(d) The agency shall not approve a merger whose effect may be substantially to lessen competition unless it finds that the anticompetitive effects are clearly outweighed in the public interest by the merger's probable effects in meeting community convenience and needs (Subsection 5).

(e) After the merger has been approved, it cannot be attacked in a proceeding under the antitrust laws except during the 30-day period following the approval. In any such proceeding, the agency may appear as a party as of right (Subsections 7(A), 7(C) and 7(D)).

(f) The court is directed to "review de novo the issues presented" and to apply the "identical" standards the agency was directed to apply (Subsections 7(A) and 7(B)).

STATEMENT.

History of the Case.

The history of this case can be said to begin with the enactment of the Bank Merger Act of 1960,[1] which was passed by Congress:

> "to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor." Senate Report No. 196, 86th Cong., 1st Sess. p. 1 (1959).

The 1960 Act required the bank regulatory agencies to consider the capital and earnings prospects of the banks, "the convenience and needs of the community to be served," and the possible effect of the proposed merger on competition. The Act specified that the agency should not approve the merger "unless, after considering all of such factors, it finds the transaction to be in the public interest." The Act did not provide for a review by the courts or set forth the standards to be applied by the court in any proceeding attacking the merger.

In 1961, the Department of Justice sued under the antitrust laws to restrain the merger of Philadelphia National Bank and Girard Trust Corn Exchange Bank, which had been approved by the Comptroller under the 1960 Act. The District Court found for the defendants. This Court reversed, finding the merger (which would have created the largest bank in Philadelphia)[2] to be in violation of Section

1. 74 Stat. 129 (1960).

2. The bank resulting from the PNB-Girard merger would have held 36% of the bank assets in the Philadelphia area and would have been half again as large as its nearest competitor. In contrast, the bank resulting from the present merger will be the fourth largest in Philadelphia, holding about 15% of the area's bank assets.

7 of the Clayton Act. *U. S. v. Philadelphia National Bank,* 374 U. S. 321 (1963). The Court noted the arguments of the defendants that Philadelphia needs a large bank to bring business to the area and stimulate its economic development, but said that it could not consider these arguments because they were not relevant to the issues under the Clayton Act.

> "We are clear, however, that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." (*Id.* at 371)

The effect of *Philadelphia National* was that, in a suit attacking a bank merger under the Clayton Act, the court could not take into account the bank regulatory agency's finding of public interest under the Bank Merger Act of 1960. The Bank Merger Act of 1966 was intended to change this result and to permit—and indeed require—the courts to consider the public interest just as the regulatory agencies are required to do. The 1966 Act establishes a more precise and rigorous standard for the agencies, permitting them to approve an anticompetitive merger *only* if the anticompetitive effects are clearly outweighed in the public interest by the convenience and needs of the community to be served. To solve the problem posed by *Philadelphia National,* i.e., the problem of the different standards to be applied by the agency under the Bank Merger Act and the court under the Clayton Act, the new Act further provides

that if an approved merger is attacked in court, the court shall apply the "identical" standards which the agency is directed to apply (Banks' Appendix 4b).

The instant case involves the first merger approved by the Comptroller and the first action instituted by the Department of Justice under the new Act. The court below entered final judgment in the nature of a directed verdict dismissing the complaint with prejudice because the Department of Justice refused to try the case in accordance with the court's construction of the Act. The steps leading to this judgment were as follows:

1. On December 6, 1965, the Appellee Banks filed with the Comptroller of the Currency a merger application containing a fifty-page Economic Brief and supporting exhibits (Banks' Appendix 8b-73b). These papers set forth the Banks' contention that the merger will have no adverse effect on competition. They also show that the merged bank will better serve the convenience and needs of the Philadelphia community.

2. On March 4, 1966, after considering the Banks' application, the advisory reports as to competitive factors received from the Federal Reserve Board and the Attorney General (Banks' Appendix 76b, 88b), extensive supplementary material filed by the Banks, and the reports of the regional Comptroller and bank examiners, the Comptroller announced his approval of the merger. On March 31 he issued his decision (Banks' Appendix 93b-112b). He found that "the competition which would be eliminated by this merger is miniscule," and that, on the contrary, "the climate of competition would be stimulated by the increased capacity of a large scale bank, and the range of choices available to customers who require services which can only be rendered by a larger bank would be increased" (*Id.* 110b). He further found that the convenience and needs of the Philadelphia community would be served through the merger "by increased efficiency, by a greater lending

capacity, through more adequate banking quarters, and by a generally improved quality of banking services. . . ." (*Id.* 111b). He further found that the merger "clearly conforms to the statutory criteria" of the Bank Merger Act of 1966 and that "We would be hindering the economic growth of Philadelphia if we failed to give our approval to this merger application" (*Id.* 112b).

3. On April 1, 1966, the Department of Justice filed its complaint seeking an injunction under Section 7 of the Clayton Act.[3] Shortly thereafter the Comptroller intervened.

4. On June 7, 1966, the court entered Pre-Trial Order No. 1, directing the parties to file pre-trial briefs setting forth the facts they expected to prove and their contentions as to the legal issues, including contentions as to burden of proof (Banks' Appendix 118b). In response to this direction, the parties stated their views regarding the function of the court as follows:

(a) The Department of Justice, in its pretrial brief, took the position that this case "is *United States v. Philadelphia National* all over again, only that the names have been changed" (Plaintiff's Pretrial Brief ¶ 117). The Department contended that the function of the court is to try the case de novo "as though no previous action had been taken." (*Id.* ¶ 81). In the Department's words, the court "makes a fresh start and comes to its own conclusions independently of the Comptroller and free of presumptions traceable to anyone." (*Id.* ¶ 80).

(b) The Banks, in their pretrial brief, stated their contention as to the function of the court as follows:

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3. On October 13, 1966, the court entered an order denying motions by the Comptroller and the Banks to dismiss the complaint for failure to state a cause of action under the Bank Merger Act (Banks' Appendix 192b). That order is not at issue in this appeal.

"The task of this Court under the Bank Merger Act of 1966 is to 'review' the decision of the Comptroller of the Currency. It hears the evidence 'de novo' (unavoidably since there was no hearing held before the Comptroller), but the judgment it must make is whether the Comptroller acted within the bounds of the discretion entrusted to him by the Bank Merger Act of 1966, not whether the Court approves of the merger and not whether the merger would violate Section 7 of the Clayton Act. In no other way can the Act be construed constitutionally since administrative determinations regarding the community needs for improved banking services and the effects of the merger in meeting these needs do not present a case or controversy within the judicial power under the Constitution. In no other way can the Bank Merger Act of 1966 be construed consistently with Congress' reiterated intent to vest authority in the bank regulating agencies to authorize mergers consistent with the public interest where public interest considerations clearly outweigh any visible impairment of competition." (Banks' Appendix 122b)

(c) The Banks' pretrial brief also outlined the Banks' case on competition and set forth in detail the facts the Banks would prove to show that the merger will serve the public interest (Banks' Appendix 140b-168b). The Plaintiff's reply brief took no issue with these facts.[4]

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4. The reply brief said that the Department "is not in a position to inform this Court whether plaintiff believes the conclusions reached [in the Banks' pretrial brief] are correct or not" (Plaintiff's Reply Brief ¶ 21). Under Pre-Trial Order No. 1, any issues, contentions or claims not set forth in the pre-trial briefs are to be deemed "abandoned, uncontroverted, or withdrawn" (Banks' Appendix 119b).

5. On October 26, 1966, the court, having received these conflicting views of the parties as to its function, ordered argument on the questions of burden of proof and the weight to be given to the Comptroller's decision. On November 4, after hearing argument, the court, in an oral opinion (Banks' Appendix 199b), adopted the Banks' view —i.e., that the function of the court is to review the decision of the Comptroller. The court ruled that the plaintiff has the burden of persuasion to show the illegality of the merger and the burden of coming forward with the evidence. The Department of Justice was ordered to show that the anti-competitive effects claimed by the Department are not outweighed by the factors of public interest, convenience and need which have been specified by the Banks and evaluated by the Comptroller.

6. The Department of Justice made no effort to obtain review of the court's order of November 4. Instead, on November 26 the Department filed its Indentification of Witnesses, Summary of Evidence and Statement of Position (Banks' Appendix 202b), in which it stated, in effect, that it would decline to comply with the November 4 order. The Statement of Position said: ". . . plaintiff does not intend, in establishing a prima facie case, to offer proof either of the existence or the significance of 'convenience and needs' factors, if any there may be" (*Id.* 213b).

7. On December 2, by reason of the Department's "Statement of Position," the Banks filed a motion for final judgment such as is entered under Rule 41(b) after completion of the plaintiff's case if the plaintiff has shown no right to relief (Banks' Appendix 214b). On December 29, the court entered final judgment for the Banks (Banks' Appendix 269b; *U. S. v. Provident National Bank et al.*, Trade Reg. Rep. (1967 Trade Cas.) ¶ 71,985 (E. D. Pa., December 29, 1966)).

Opinion Below.

The Department of Justice contended below, as it contends here, that the District Court must independently determine whether the public interest in the merger outweighs any anticompetitive effects. The court below rejected this contention for two reasons: first, the contention would nullify the expertise, know-how, direct findings and conclusions of the regulatory agency; second, it would violate the constitutional separation of powers (Banks' Appendix 271b, 272b).

In so construing the Bank Merger Act, the court below followed a ruling by the three-judge court which is trying the San Francisco bank merger case: "It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term 'de novo' does not speak of a trial de novo but of a *review* de novo." *U. S. v. Crocker-Anglo National Bank, et al.,* Trade Reg. Rep. (1966 Trade Cas.) ¶ 71,898 at 83,156 (N. D. Cal., October 6, 1966).

The California court, like the court below, based its decision on the constitutional separation of powers, saying:

> ". . . the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." *Id.* at 83,154.[5]

5. This holding in *Crocker-Anglo* was cited and followed by the District Court for the Middle District of Tennessee in *U. S. v. Third National Bank of Nashville,* 260 F. Supp. 869, 873, 874 (1966). Three other District Courts have taken essentially the same view in

Having established that its function is to review the Comptroller's decision, the court below assigned to the Department of Justice "the overall burden of persuasion to show the illegality of the merger" (Banks' Appendix 201b). This is the normal burden of persuasion undertaken by any plaintiff or petitioner seeking review of an administrative decision.

However, normal review proceedings involve only the burden of persuasion. There is no occasion to consider the burden of coming forward with evidence because the review is made on the record before the administrative body and is governed by the substantial evidence rule. In the instant case, the court below rejected the substantial evidence rule because the Comptroller did not hold a hearing. The court below said:

> ". . . when there is no hearing, it cannot be contended that the findings of the Comptroller should be given the weight of hearing based findings." (Banks' Appendix 200b)

The court below then set forth the procedure which it would follow in reviewing de novo the issues presented:

> "Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside." (Banks' Appendix 200b)

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holding that the Department of Justice has the burden of pleading on the issue of public interest: *U. S. v. First National Bank of Hawaii, et al.,* Civ. No. 2540, D. Hawaii, 1966 (oral opinion of October 31, 1966, unreported); *U. S. v. First City National Bank of Houston,* before this Court on appeal at No. 914, October Term, 1966; and *U. S. v. Mercantile Trust Company, et al.,* 1966 BNA Antitrust and Trade Reg. Rep. No. 286 (1/3/67) page X-6 (E. D. Mo. December 19, 1966).

The Court assigned to the Department the burden of coming forward with evidence on the factual issues relating to public interest, as well as anticompetitive effects (Banks' Appendix 201b).

The procedure and scope of review prescribed by the court below are the same as those prescribed by the Fourth Circuit Court of Appeals in *First National Bank of Smithfield, North Carolina v. Saxon,* 352 F. 2d 267 (1965). The *Smithfield* decision described this procedure as a "review de novo" (*Id.* at 273).

Convenience and Needs and the Public Interest.

The basis for the decision below was that the determination of public interest under the Bank Merger Act is a legislative or administrative function which the court is not equipped to perform and which the Constitution does not permit the court to undertake. The considerations of community convenience and need in this case (as set forth in the Banks' economic brief filed with the Comptroller and the Banks' pretrial brief and outline of testimony filed with the court below) are illustrative of the administrative policy and expertise which are necessarily involved in evaluating the public interest in any bank merger. In brief, they are as follows:

1. The merger of Provident and Central-Penn is a step in the evolution of the banking structure in Philadelphia. The principal factors in that evolution have been the development of full service banks able to provide complex and sophisticated financial services, the development of retail branch systems to make these services available to individuals and small businesses in the Philadelphia metropolitan area, and the development of methods for making these services available to country correspondent banks and their customers throughout Eastern Pennsylvania and the nearby states. The merger will further all three of these developments in that the merged bank will provide

improved services, will make them available within the Philadelphia community through a more widely based branch system, and will also be better able to serve its correspondents and their customers in a very much larger community (Banks' Appendix 29b-34b, 144b-155b, 222b-240b).

2. The merger of Provident and Central-Penn must also be viewed in relation to the broader evolution of banking. The money market in which banks operate is becoming more national and international.[6] Philadelphia is part of a developing megalopolis stretching from Boston to Washington. Foreign banks are operating in this country. Larger United States banks are increasing their offices and investments abroad. Only the larger banking units can take advantage of the potentialities of automation and computerization for efficiencies in operation and improvements in service. Their services benefit small customers as well as large. Indeed, the smaller customer (including a smaller bank) may have greater need for the specialized services provided by larger banks because he lacks the resources to provide these services for himself (Banks' Appendix, 140b-141b, 226b-229b, 251b-252b).

3. Banks in a metropolitan area such as Philadelphia fall into two groups for Federal Reserve purposes: reserve city banks and country banks.[7] In Philadelphia, the coun-

6. The Comptroller pointed out that "money, either in the form of savings, deposits, or credits, moves with great ease and rapidity; its flow is not impeded by political boundary lines" (Banks' Appendix 94b, 95b).

7. The two classes differ in the amount of reserves required to be maintained against demand deposits, the requirement being currently 16½% for reserve city banks and 12% for country banks, 12 CFR § 204.5 as amended; 31 Fed. Reg. 15,793 (December 8, 1966). In addition, many of the country banks in the Philadelphia area are state banks and not members of the Federal Reserve System. As nonmembers, they can invest up to 40% of their reserves in income producing obligations, whereas member banks must maintain their reserves in the form of vault cash or as non-interest

try banks operate almost entirely at the retail level; i.e., they serve mostly individuals and local or regional businesses. The reserve city banks operate at the wholesale as well as the retail level; that is, in addition to their retail business, they do a substantial volume of business with large corporations and financial institutions operating in the national money market and also serve numerous correspondent country banks over a wide area. It is the reserve city banks which compete in the developing national and international markets and which, in general, provide the most sophisticated financial services for their own customers and those of their country correspondent banks (Banks' Appendix 55b-57b, 144b-149b, 154b-156b, 226b-227b, 248b-249b, 251b-252b, 254b).

4. There are in the Philadelphia four-county area six reserve city banks and 31 country banks. Central-Penn is the smallest of the reserve city banks—less than one-quarter the size of the largest bank. It is also smaller than the largest of the country banks. Provident is the second smallest reserve city bank—less than half the size of the leader. The merged bank will be the fourth largest in the City. It will be about two-thirds the size of the leader and three-quarters the size of the second bank (Banks' Appendix 183b-191b, 141b-142b, 161b).

5. More than 50% of Central-Penn's deposits and 60% of its loans are in the national market as defined in *U. S. v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 921 (S. D. N. Y. 1965). The corresponding figures for Provident are 60% and 70% (Banks' Appendix 166b-168b, 178b-182b). Thus, the principal effect of the merger will be to consolidate the national segments of the Banks' business and provide a broader base and larger volume of

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bearing balances with the Federal Reserve Bank. They also, unlike member banks, can consider uncollected items in transit as cash reserves and can use reserve balances to compensate their city correspondents for services (Banks' Appendix 183b-184b).

transactions to support more specialized services and personnel. The combination will have no adverse competitive effect on the national market, since the merged institution will rank in about 40th place nationally. The complaint does not charge a lessening of competition in this market.

6. In the retail segments of their business, the two Banks have located their branches to serve different portions of the Philadelphia four-county area, and the Comptroller found that the overall competition between their branches is not significant (Banks' Appendix 105b-110b).

7. Not only is Central-Penn far smaller than its reserve city rivals, it is also less well equipped for competition with them and with the larger banks in New York, Pittsburgh and other nearby financial centers, to retain its present wholesale business and attract additional wholesale customers. Its trust assets are one-twentieth the size of either of the two largest; its correspondent bank balances are less than one-tenth those of the leading bank; its foreign department consists of a single officer and a small staff; its operations are not as fully computerized as those of its larger competitors; its capital and earnings ratios are the lowest of the reserve city banks; and its stock sells at the lowest prices in relation to book value and earnings (Banks' Appendix 151b-152b, 229b-234b).

8. Merger with Provident will strengthen Central-Penn and improve its services in trusts, construction loans, correspondent banking, and foreign banking. The consolidation of their operations will very substantially reduce Central-Penn's operating costs.[8] Provident has the highest capital ratios in Philadelphia, offsetting Central-Penn's lower ratios. The branch systems of the two banks are complementary rather than competitive. In short, the

8. The savings to be expected from the merger were initially estimated at $1,250,000 annually (Banks' Appendix 152b). The figure was later increased to $1,500,000 annually (*Id.* 229b).

merger will provide a unique solution to Central-Penn's competitive problems and at the same time will provide an improved quality of services to retail and wholesale customers alike (Banks' Appendix 28b-34b, 105b-112b, 150b-155b, 230b-234b).

9. The Philadelphia metropolitan area is lagging in economic growth. From 1953 through 1964 its employment growth rate was one-twentieth of the national rate. The Port of Philadelphia is not holding its own in general cargo traffic as against competing ports on the Eastern Seaboard. There has been a serious decline in the number of substantial businesses maintaining their head offices in the City. In the vernacular, Philadelphia has been handicapped by a "small town," "branch office" reputation. Government officials and civic leaders are now engaged in efforts on many fronts to revitalize the area's economy[9] (Banks' Appendix 48b-52b, 155b, 156b, 240b-249b).

10. Philadelphia's banks are very much smaller than banks in nearby financial centers competing with the Philadelphia business and financial community. Each of the two largest banks in New York has total assets more than twice the combined total assets of the six reserve city banks in Philadelphia. The leading bank in Pittsburgh is twice as large as the leader in Philadelphia. Boston, Cleveland and Detroit all have larger banks than Philadelphia.[10] Part

9. See the following articles in the Business Review of the Federal Reserve Bank of Philadelphia: "Philadelphia's Missing Jobs," September 1964, p. 12; "Philadelphia and its Competitors," November 1965, p. 3.

10. The article "Philadelphia's Lagging Loans" in the Business Review of the Federal Reserve Bank of Philadelphia for February 1966 says (p. 11): "There are many other factors as well which may have had something to do with the lag in loans. Included among these are Philadelphia's proximity to New York (hence the physical ease of traveling to the nation's financial capital to negotiate a business loan), the smaller size of Philadelphia's banks relative to their New York cousins (which means that New York banks can loan more in one chunk to the firm with larger credit needs), and the fact that Philadelphia in recent years has lost some head offices of major firms through the merger route and otherwise."

of Philadelphia's economic problem is its "short pants" banks[11] (Banks' Appendix 52b-54b, 155b-156b, 240b-249b).

11. So described by the then Mayor of Philadelphia testifying in the *Philadelphia National Bank* case. As Congressman Patman said in the course of the hearings on the 1966 Act, in determining the convenience and needs of a community, the logical first person to consult is the Mayor (Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess., pp. 161-3 (1965)).

OUTLINE OF ARGUMENT.

There is no dispute between the parties that the Constitution precludes the federal courts from performing legislative-type functions of the kind ordinarily entrusted to administrative agencies. If the Bank Merger Act contemplates a broad administrative inquiry to evaluate the public interest in a bank merger, the construction of the Act proposed by the Department of Justice is unconstitutional.

In point of fact, the decisions of banking agencies in respect of bank mergers, unlike those of the federal courts in antitrust cases, are administrative in nature. Through their decisions on merger, charter and branch applications, the agencies control the evolution of banking structure—permitting the creation of new banking units and the evolution of larger units as appropriate to meet the changing public needs. In making these decisions they take into account the benefits to be expected from the merger in the form of improved services or increased competition. They also take into account any detriments which might result from disapproval of the merger application.

The banking agencies' determinations are made against a background of experience and specialized information not available to a federal court. These include not only developments in the deposit and loan structures of commercial banks, but also the competition among banks and between banks and other financial institutions and the effects of the regulation of interest rates and banking credit.

There is no foundation for the Department's argument that the Bank Merger Act contemplates a narrower range of agency inquiry than is provided in other administrative statutes. When Congress was considering the Bank Merger Act of 1966, it knew that the banking industry, the bank regulatory agencies, and the Senators and Congressmen proposing the legislation were interpreting the phrase

"convenience and needs" in its broadest sense. There can be no doubt that the legislation incorporated that broad meaning.

Moreover, even under the narrow interpretation of convenience and needs proposed by the Department, the inquiry into these factors would still be so broad as to be legislative or administrative and not judicial.

The court below was correct in rejecting the Department's interpretation of "review de novo," because that interpretation would be inconsistent with the usual deference to administrative agencies and would also be unconstitutional. The court's interpretation of "review de novo" is consistent with the Constitution and follows the precedent of *Smithfield.*

Regarding the effect to be given to the agency approval, Congress, in the Bank Merger Act of 1966, changed the three legislative features of the Bank Merger Act of 1960 to which this Court pointed when it declined to defer to the agency approval in *Philadelphia National.* The 1966 statute, unlike the 1960 statute, (a) specifies the weight which the agency must give to competitive factors, (b) provides for a hearing before the District Court, and (c) makes specific provision for judicial review. The clear implication from these changes is that the banking agencies' decisions will no longer be disregarded but instead will be accorded the presumptive validity accorded to decisions of other regulatory bodies.

The decision of the court below that the Department has the burden of proof follows the normal procedure in review proceedings. Its decision that the Department has the burden of coming forward with the evidence on all factual issues follows *Smithfield* and is in accord with the statutory scheme of "review de novo."

The Comptroller's failure to hold a hearing does not detract from the weight to be given to his decision. Banking agencies traditionally operate without formal hearings in most cases, and this procedure has been endorsed by the

courts, the text writers, and the Attorney General. The agencies hold hearings in cases where they feel this procedure is appropriate, and the District Court can remand to the agency for a hearing in any case.

The disagreement between the Department and the banking agencies should be resolved—not by making two separate and independent determinations, one by the agency and the other by the court—but by subjecting the agency determination to judicial review. That is the holding of the court below.

The Department of Justice staked its case on its interpretation of the Act and made no effort toward an interlocutory appeal, although it well knew that by so doing it was risking a final judgment on the merits. The dismissal with prejudice entered by the court below was in accordance with Rule 41(b) and the decisions thereunder and should be affirmed without remand.

ARGUMENT.

I. The Judgment Below Should Be Affirmed.

There is no dispute between the parties that, to use the words of the Brief for the United States (p. 46), "Article III of the Constitution precludes the federal courts from performing legislative-type functions frequently entrusted to administrative agencies."[12] There would also appear to be no dispute that if the words "public interest" and "convenience and needs" are used in the Bank Merger Act with the broad meaning they have acquired in connection with other regulated industries,[13] the determination of public interest in a bank merger is a legislative function, not a judicial one, and the judgment of the court below should be affirmed.

The Brief for the United States (p. 42) admits that "superficially" the wording of the Bank Merger Act invites "an unchanneled inquiry into all phases of the merger's possible impact." It then argues, however, that "a much more narrow and focused inquiry was intended." Later sections of this brief will show that Congress did not intend the "narrow and focused inquiry" envisioned by the Department, and furthermore that, even under the

12. The classic citations are: *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464 (1930); *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933). See also, *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952); *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693 (1927); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428 (1923).

13. In holding that "public interest" was a proper basis for delegation of the legislative function under the Transportation Act of 1920, this Court said "the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." *New York Central Securities Co. v. U. S.*, 287 U. S. 12, 25 (1932).

Department's narrow interpretation, the function would still be legislative or administrative and not judicial. But before proceeding with that analysis, we will here review the policy considerations and administrative expertise involved in determining whether a bank merger is in the public interest, and will show that the court below was right in holding that this is the kind of determination which a federal court is not equipped to make and is not permitted to make under the Constitution.

The Determination of Public Interest in a Bank Merger Involves Administrative Policy.

Unlike the decision of a federal court in a Clayton Act case, the decision of the Comptroller or the Federal Reserve Board or the Federal Deposit Insurance Corporation (or the state banking authorities) in respect to the approval or disapproval of a bank merger is not an isolated action. While the court concerns itself only with the challenged merger, the decisions of the banking agencies on individual mergers are part of the administrative process by which the agencies control the evolution of the banking structure to meet the changing public need for credit and for banking, fiduciary and financial services. The Comptroller of the Currency has stated:

> "The banking structure that is most ideal in terms of the public need will vary with the changing requirements for banking services and facilities. Like the operating powers of commercial banks, the structure of the banking industry must continuously be adapted to emerging demands and opportunities." (1964 Annual Report of the Administrator of the National Banks, reprinted as a Supplement to this Brief, p. S-1)

The control of banking structure involves the administrative control of bank charters and branches as well as

mergers.[14] The policies followed by the Comptroller in passing upon charter, branch and merger applications were described in his 1964 Annual Report issued September 1, 1965. Portions of that report were considered by the House Committee on Banking and Currency during its debate on the Bank Merger Act of 1966 and are reprinted in the Hearings of the Committee (Statement of James J. Saxon, Comptroller of the Currency, Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. pp. 730-733 (1965)). The pertinent sections are printed in full as a supplement to this brief.

The Comptroller recognizes that the public interest is not well served by a superabundance of small banking units any more than it would be served by great numbers of small railroads. A limited number of larger units are needed to meet the needs of large corporations and financial institutions and to exploit the large-scale capacity of modern automation techniques and computers for providing efficient operations and services [15]—which are available to customers of all sizes and to country correspondent banks and their customers. Because of the statutory and regu-

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14. The cumulative effect of administrative decisions approving or denying merger and branch applications on the evolution of banking structure in New York is described in Note, "Branching and Merging under New York's Omnibus Banking Law," 115 U. of Pa. L. Rev. 218, 222-230 (December 1966).

15. Governor Mitchell of the Federal Reserve System, speaking to the American Economic Association in May of 1966 on "The Impact of Automation on Bank Structure and Function," said: "If this [full use of automation and computers] should happen—and assuming public policies are accommodative—not only banking services but also banking structure could be literally transformed. Profound structural changes seem almost a certainty. Automation can and will burst the locational constraints that are implicit in Federal conformity to the provisions of 50 State banking laws pertaining to branching. Not only will metropolitan area-wide banking operations become commonplace everywhere at the option of bank managements but remote control banking State-wide, and even across State lines, will also be feasible, limited by little more than the telephone toll costs of servicing more distant customers."

latory limitations on the banking business, older and slower-growing cities cannot expect to obtain larger banking units through internal growth. In such circumstances, mergers should be permitted in a limited number of cases where they are clearly in the public interest. On this point the Comptroller's Statement of Policy says:

> "The public benefits which may be derived from mergers stem basically from the economies of large-scale enterprise, and the greater variety of services which larger firms may offer to consumers. These benefits will arise where increases in the scale of operations yield savings in costs, or where a broadening in the lines of production or the extension of operations to new markets permit greater dispersion of risks and thus allow the undertaking of ventures unsuitable for smaller firms. A larger and more broadly based bank may also be able to offer specialized services which are not profitable for smaller institutions, and should be able to move capital more efficiently from surplus to deficit areas. Moreover, the legal lending limits of banks require the presence of larger institutions to meet the needs of larger businesses most proficiently."
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> * * *
>
> "There are two reasons why merger may often be the preferred course of expansion in banking, even though in comparable circumstances reliance on internal growth may be more appropriate for the unregulated industries.
>
> "First, the banking authorities have a positive responsibility to see that the public convenience and need for banking services and facilities are met. In carrying out this responsibility, they do not have the authority to require the provision of service such as is found in the fully regulated industries like the 'public utilities'; their choices are limited to the private proposals for bank expansion presented for their approval.

If they find that a proposed merger will yield public benefits and they see no superior means for achieving these benefits either at hand or in clear prospect, they have a strong positive reason for approving the merger. In the unregulated industries, there is no public responsibility to fashion industry expansion according to the public need; reliance is placed on private initiative and no public authority faces the problem of choosing the form or method of industry growth." (Pages S-10, S-11, S-12, *infra*)

Chairman Martin of the Federal Reserve System, testifying before the House Committee, said:

> ". . . It is very difficult to make these quantitative and qualitative judgments on these things, with the country on the march as it is today. We are a growing, developing, advancing country. There are going to be shifts from small banks to medium-sized banks and medium-sized banks to large banks; and with the fact that there are certain institutions like the Bank of America, which is an outstanding bank in your own State, they should not be just isolated all alone forever. They are entitled to respect for the achievements that they have made, but they are not entitled to protection any more than a medium-sized bank or a small bank would be." (Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess., p. 141 (1965).)

The circumstances of the instant case are illustrative of these policy considerations. Philadelphia needs larger banking units for its economic health, but the Philadelphia economy is not expanding sufficiently to permit a major expansion of any Philadelphia bank by internal growth. Moreover, the banking law of Pennsylvania limits the Philadelphia city banks to an artificial four-county area (Banks' Appendix 184b-191b). This denies them the right

to branch into such nearby communities as Downingtown, Coatesville, Allentown, Bethlehem, Reading, York and Lancaster, which would otherwise be natural areas for expansion and growth. Furthermore, the Pennsylvania-New Jersey boundary prevents Philadelphia banks from entering Camden, and the boundary with Delaware makes Wilmington "off-limits." Thus, the Philadelphia banks are hedged into an unnaturally confined area with little growth possibility.

In these circumstances the practical alternatives facing the banking agencies are either to disapprove all but the most inconsequential mergers, thus freezing the present status and immunizing the existing leaders from challenge, or, as the Comptroller has done in this case, to approve a merger which will improve the competitive climate [16] and provide better service.

The Federal Reserve Board agreed with the Comptroller that the merger of Provident and Central-Penn will have just such pro-competitive effects. Its advisory report says:

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16. The effect of the merger in tightening competition among the larger banks can be seen in the following tabulation showing the leading banks' shares of deposits of individuals, partnerships and corporations at October 13, 1965, as computed by the Federal Reserve Board (Banks' Appendix 83b-84b) and the same figures recomputed to reflect the merger of Provident and Central-Penn:

Before Merger		*After Merger*	
First Pennsylvania	20.2%	First Pennsylvania	20.2%
PNB	17.6	PNB	17.6
Girard	16.2	Girard	16.2
Fidelity	12.8	Provident	15.1
Provident	9.7	Fidelity	12.8
Continental	5.8	Continental	5.8
Central-Penn	5.4	IVB	2.8

No other financial center in the country (with the possible exception of New York) presents such an evenly balanced array.

Moreover, the Federal Reserve Board reported that "the Philadelphia four-county area is not unduly concentrated as compared with the nation's major standard metropolitan statistical areas" (Banks' Appendix 86b).

"Currently, Provident is the fifth largest bank in the Philadelphia four-county area in terms of IPC deposits and loans, and it ranks sixth in terms of banking offices. Central-Penn ranks seventh in these three categories. If the proposed merger is consummated, the resulting bank would rank fourth in size based on IPC deposits, third in size based on loans, and first in size based on the number of banking offices. In addition to having the most offices, the geographical coverage of such offices in the four-county area would be the most thorough and extensive of the area banks. With regard to the trust department, Provident currently ranks fourth behind First Pennsylvania, Girard, and Fidelity in the value of assets held and, if the merger is consummated, it would still rank fourth in the value of assets held although it would be first in the number of individual accounts under administration. Concerning the Philadelphia area, the resulting bank, with its increased lending limit and its branch system enlarged, *would be in a position to compete more effectively* with the three largest Philadelphia banks; namely, The First Pennsylvania Banking and Trust Company, The Philadelphia National Bank, and Girard Trust Bank." (Emphasis supplied.) (Banks' Appendix 76b, 85b)

Other policy aspects are involved when the regulatory agency considers what may happen to the banking structure if the merger application is denied. In the instant case it is clear that if the merger is forbidden the larger banks in Philadelphia will be relieved of the competition which the merged bank would have provided. But that is not the end of the matter. If Central-Penn is denied the right to merge, some banking services which it now provides to the public may be lost. Central-Penn has the lowest earnings ratios among the Philadelphia reserve city banks. The competitive pressure to improve earnings could well lead to the elimination of operations considered to be high in

cost or low in profit, regardless of the community need for such services (Banks' Appendix 157b, 232b-233b).

Another possibility which might suggest itself to future management, if the merger were denied, would be to move the Bank's head office outside Philadelphia County, thus lowering the Bank's required reserves on demand deposits by 27% and obtaining branching privileges in three counties additional to the four in which the Bank can now branch (Banks' Appendix 188b). A further possibility would be to convert the institution to a state bank and resign from the Federal Reserve System, thus obtaining the right to obtain income from 40% of the Bank's reserves which now yield no return to the Bank[17] (*Id.* 184b).

While such a move might improve the Bank's earnings ratios, it would be undesirable on two counts. First, it would contribute to a trend which has given increasing concern to the Federal Reserve Board.[18] Second, it would

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17. This possibility is discussed in more detail in the affidavit supporting the memorandum of the Banks opposing any further stay of the merger (Banks' Appendix 298b). See also, "The Changing Profitability Gap," Business Review of the Federal Reserve Bank of Philadelphia for July 1966, which analyzes the earnings performance of country banks versus reserve city banks in the Philadelphia area and concludes that, during 1961-65, "Earnings of country banks in the district rose much faster than those of reserve city banks" (p. 13).

18. The Federal Reserve Board has noted this problem with concern. Its Annual Report for 1965 states: "The increase in demand for credit and the corresponding increase in competitive pressures to avoid the burdens of reserve requirements in attempting to meet this demand have resulted in accelerated withdrawals by member banks from the System in recent years. While the problem heretofore has been primarily one of inequity between member and nonmember banks, it is fast reaching the point where System effectiveness in the implementation of monetary and credit policy may be impaired. During the decade 1946-55, an average of 9 banks per year terminated their membership in the System, whereas in the decade 1956-65, average withdrawals jumped to 24 per year. It is even more significant, in this connection, that such withdrawals during the last decade included a number of relatively large banks, with the result that deposits substantially in excess of $2 billion ceased to be subject to reserve requirements imposed in accordance with the Federal Reserve Act" (page 236).

adversely affect competition in wholesale banking among Philadelphia banks. The reason is that a change in status from reserve city bank to nonmember country bank would substantially curtail Central-Penn's wholesale business; and the wholesale business lost by Central-Penn would gravitate—not to the next smallest bank as it would under the proposed merger with Provident—but to the largest wholesale banks in the City. Thus, in reaching a decision to approve or disapprove a merger, the agency cannot assume that disapproval will perpetuate the status quo. The result of disapproval may be to force other structural changes which would be substantially adverse to the public interest.

A decision which involves the weighing of policy considerations such as these is appropriate for an administrative body which can take into account not only the capacities and intentions of the banks involved, but also the capacities and probable intentions of other banks, and which can also control other mergers and expansions by other means. The decision would be inappropriate for a federal court. In the words of the District Court for the Southern District of New York, speaking of the Manufacturers-Hanover merger:

> "We think that if ever there were a field requiring administrative expertise to unravel the tangled threads of the evidence and weave them into a meaningful fabric, this is it. This case involves a multitude of technical, intricate and complex problems in the field of money and banking, a subject within the special competence of the [Federal Reserve] Board and outside the conventional experience of judges.
>
> "The Board is intimately familiar with this technical subject matter, as well as the competitive realities involved, from its long experience as the administrator of the nation's banking system, periodic reports, examinations, studies, etc. It knows the relevant products; the parties to this merger and the pattern

of their business; the extent, locus and significance of previous competition between them; the number, strength and pattern of business of remaining competitors and the vigor of competition, both locally and nationally; the banking habits of all customers, great and small; their practicable banking alternatives; the geographic areas of effective competition for their banking business; the history, interrelationships and trends of the geographic markets; the probable impact of the merger on depositors, borrowers and competitors, great and small, local and national; the degree of concentration, locally and nationally; the reasons for concentration and its effect on the competitive picture; the operations of the nation's money markets; and the effect of the government's monetary and fiscal operations on the markets and the impact of this merger upon them." *U. S. v. Manufacturers Hanover Trust Co., supra* at 881.

In the final analysis, public interest means what is good for the community. Do the business and financial institutions in the community need banks with larger lending limits? Would new businesses be attracted if the banks in the community offered more sophisticated services? Will the merged institution have the prestige to attract specialized personnel to provide these services? Will it be efficient enough to afford them? Will improvement in its services stimulate its competitors to improve their services? These are the questions that must be answered and they are preeminently legislative in nature.

The Determination Required by the Bank Merger Act Involves Administrative Expertise.

In addition to policy, the determination of public interest in bank mergers involves many considerations which can be described, in the words of the court below, as "expertise" or "know-how." These are matters of day-to-

day experience to an administrator and form an unwritten background for his policy decisions. For the court to obtain the same background, the trial would have to include a seminar in banking history and practice. For example:

(a) Since this Court's decision in *Philadelphia National,* there has been a major change in the deposit structure of commercial banks. With rising interest rates, depositors (especially large corporations) have reduced their non-interest bearing demand deposits. This has forced the banks to rely increasingly on interest-bearing time deposits. The cost of paying interest on these deposits has narrowed profit margins and made more urgent the need for operating economies. Such economies, in turn, are largely dependent on the use of computers, which are costly to acquire and operate. All of these developments have a bearing on the Provident–Central-Penn merger (Banks' Appendix 230b-234b).[19]

(b) Related to the changes in deposit structure are changes in the competition between commercial banks and other financial institutions and among the larger commercial banks. The competition for corporate funds has led the larger banks to issue negotiable certificates of deposit, a new and highly controversial instrument in the money market. Again, these developments have a significant bearing on the instant merger in relation to the wholesale segment of the Banks' businesses[20] (Banks' Appendix 233b).

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19. This change has been commented upon extensively in banking periodicals; see, e.g., "Changing Patterns of Bank Deposit Growth," Monthly Economic Letter of First National City Bank of New York for June 1966, page 64; "The Race for Savings," Business Review of Federal Reserve Bank of Philadelphia for December 1965, page 14.

20. The Monthly Review of the Federal Reserve Bank of New York for November 1965 described this competition thus: "The negotiable time certificate has greatly contributed to a broadening of the competition for bank deposits from the local and regional to the

(c) A third development which has occurred almost entirely since *Philadelphia National* is the complex matter of automation and its effects on commercial banks. In addition to computerizing their own operations and providing electronic data processing for their customers, reserve city banks provide similar services to their correspondent country banks. Any improvement in the services of the city bank improves the quality of banking services offered by the country bank and thus affects competition between that country bank and its competitors (supported by their city correspondents).[21] Thus, developments in this field will have effects throughout the area where the Banks have correspondents—i.e., Pennsylvania, New Jersey, Delaware, Maryland, the District of Columbia and Virginia. The District Court would be hard pressed to weigh the significance of these developments independently of the Comptroller.

(d) Another important development in recent years is the change in the loan portfolios of commercial banks (at least those in the reserve city category) from the traditional short-term self-liquidating loans to the much more complex term loans to finance new processes, products and equipment. These complicated

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nationwide level. Furthermore, the competition for profitable loans and investments has also been broadened, since the C/D market facilitates the search for the needed resources once the lending opportunity arises. The large money market banks have turned out to be strong competitors, particularly because a C/D possesses greater marketability if it is issued by a bank of national repute. This criterion is readily met by the large New York banks, which are therefore able to obtain deposits by issuing C/D's at somewhat lower interest rates than smaller and less well-known banks. The competitive strength of New York 'prime banks' is reflected in the absolute and relative growth of their outstanding C/D's" (p. 249).

21. For example, see "Country Banks and the Federal Funds Market," Business Review of Federal Reserve Bank of Philadelphia for April 1966, which describes how "the big city correspondents are very much involved in assisting the country member banks in the Third District with federal funds and related transactions" (p. 7).

loans require specialized personnel, which a bank cannot afford without a substantial volume of such transactions. This development has affected the business of Central-Penn and is a significant factor in the background of the merger.[22]

(e) Other considerations were present in the San Francisco bank merger case,[23] including the effect of the merger on foreign and international banking and on competition in bidding for state and municipal bonds.

(f) Even the evaluation of the services offered by the merging banks and promised by the resulting institution—an evaluation which must be made in every case—demands a background of banking expertise. In the words of the Comptroller, testifying before the House Committee:

"... It seems to us we must deal with these terms not in a broad brush sweep but in terms of the particularities and specifics of the banking business, how is the public interest, public effect, to be determined? To me this means breaking down the effect by category of services of banks in terms of the user public.

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22. Among many commentaries, see "Sharp Increase in Number of Term Loans Lengthens Maturity of Whole Portfolio," Review of Federal Reserve Bank of New York for January 1967.

23. *U. S. v. Crocker-Anglo National Bank, et al., supra.* The California court cited with approval the following quotation from Finfrock, "Trial *de Novo*—Panacea?" in 14 Baylor Law Review, 135, 160: "This criterion [public policy] in essence classifies as administrative and non-judicial, decisional functions which courts are not particularly equipped to decide while leaving to the court that category of decision making with which it has traditionally dealt and is equipped to handle under the adversary type of judicial procedure. Decisions that require the inquisitorial type of procedure, investigative in nature, and which must, to attain optimum utility, be based upon a mosaic of expert opinion, judgment, and decisions are and should be regarded as non-judicial and left primarily to the administrators. They are far more able to come to grips with such problems than a court or jury in the detached and sterile atmosphere of the courtroom." Trade Reg. Rep. (1966 Trade Cas.) ¶ 71,898, p. 83,154 fn. 5.

"How is the consumer of bank services affected?

"Has loan volume been reduced? Is a certain type or are certain types of loans unavailable, consumers loans, or less available? Have rates been increased or decreased? Are there broader services or fewer services rendered? Are the services of lesser or better quality?

"Are the costs higher or lower? These are the true measures in terms as I would define the public interest and the effect of competition and the effect generally of the merger on the consumer public, not in terms of a broad sweep that this is somehow contrary to the public interest. It seems it can be meaningful only in terms of breaking down that, in terms of the actual services rendered by the institution.

"Broader or lesser; qualitywise, costwise, ratewise, and otherwise, and the effect in individual cases on various parts of the consuming public. Otherwise it seems to me this term 'public interest' has meaningless implications, meaningless application.

"And this is what we attempt to do in every situation.

"What are your service charges? What are your rates? What kind of loans do you grant? Do they grant consumer loans? Do they take savings? What rate do they pay on savings? Do they have trust service? What are the trust service rates? What do the schedules show? And the vast area of service. To what extent are they really serving the public in terms of specifics and will this be improved or not as a result of the merger and so, as in many cases, actually to enhance competition, as frequently happens." (Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. pp. 717-718 (1965))

> Does the Department of Justice seriously propose that the court shall answer those questions and evaluate the result independently of the Comptroller and free of presumptions traceable to his informed judgment?

All the foregoing must be understood against still another background—the complex regulatory process by which the Federal Reserve Board controls the amount of credit available to banks, the ability of commercial banks to bid for interest-bearing deposits in competition with savings institutions and other investment media, and even the kinds of loans which banks can make in times of credit scarcity. Again, this regulatory scheme and its effects on bank growth and competition are commonplace to the banking agencies—but not to a federal court.

There Is No Foundation for the Department's Narrow Reading of the Act.

Admitting that determinations of public interest and community convenience and need are generally wide-ranging and legislative in nature, the Department of Justice argues that in the Bank Merger Act "a much more narrow and focused inquiry was intended." A review of the legislative history shows the opposite—that Congress intended the phrases "public interest" and "convenience and need" to have the same broad meaning in the Bank Merger Acts of 1960 and 1966 that they have had throughout the history of regulated industries.

Congress knew that public convenience and necessity is the basis for regulatory decisions of the Interstate Commerce Commission (49 U. S. C. §§ 306, 307, 909), the Civil Aeronautics Board (49 U. S. C. § 1371), and the Federal Communications Commission (47 U. S. C. §§ 214, 307). In the field of banking, the standard of community convenience and need is to be found in state statutes regulating the chartering, branching and merging of banks; e.g., New York Banking Law §§ 24, 29; Pennsylvania Banking Code §§ 1007, 1604 (7 P. S. §§ 1007, 1604).

These provisions have been broadly interpreted. For example:

> "[P]ublic convenience and necessity may be found in operating economies and those things which contribute to expedition, public safety, and, efficiency in operation, because, while they benefit the carrier first, they indirectly contribute to the public safety and more reliable and expeditious and cheaper transportation." *East Texas Motor Freight Lines v. U. S.*, 96 F. Supp. 424, 428 (N. D. Tex. 1951).[24]

When Congress was considering the 1966 Bank Merger Act, it had very much in mind *Philadelphia National Bank* and the considerations of public interest which the banks advanced in that case and which this Court held to be irrelevant. Those considerations were, primarily, increased competition in the national market and the stimulation of economic development (374 U. S. at 370, 371). It follows that these were the kind of factors which Congress expected would be taken into consideration under the Bank Merger Act of 1966.[25]

Moreover, Congress also had before it the statements of the regulatory agencies as to what they routinely take into account under the heading "convenience and needs."

(a) *The Comptroller of the Currency.* The Comptroller's views are set out in the Supplement to this

24. See also, *Aero Mayflower Transit Co. v. U. S.*, 95 F. Supp. 258, 262 (D. Neb. 1951).

25. The House Committee report states that the expression of certain factors in the statute "would not preclude the banking agencies, charged as they are with general supervisory responsibility, from considering in any particular case such other factors as they might deem relevant" (H. Rep. No. 1221, 89th Cong., 2d Sess., p. 4). Perhaps the best indication that Congress expected the banking agencies and the courts to consider the factors advanced by the banks in *Philadelphia National* is Section 3 of the Bank Merger Act of 1966 (Banks' Appendix 7b), which permits the Philadelphia National and Girard banks to reinstitute their merger application and have it decided under the new Act.

brief. He mentioned particularly economies of operation, improved and specialized services, and larger lending limits. (Infra, page S-10)

(b) *The Federal Reserve Board.* The views of the Federal Reserve Board were expressed by George W. Mitchell, a Member of the Board, as follows:

> "How does one go about judging whether the convenience and needs of the community will be benefited by a change in banking ownership and management? This involves determining the actual breadth and intensity of community demands for various banking services, as distinct from the quantity and quality of services that the existing and proposed new combinations of banks intend supplying. To do this one needs to survey community opinion on the status quo, to find out how both business and household customers appraised the quantity and quality of the banking services available to them.
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> "But it is hard for bank customers to compare services they are accustomed to with those they have never had the opportunity to try out. Such survey results, therefore, must be supplemented by a more knowledgeable appraisal. In this appraisal, the broad experience of bank examiners in the qualitative and quantitative aspects of banking services can usually be helpful.
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> "Another aspect of the impact of bank mergers upon the 'convenience and needs of the community' concerns the contribution that banks can make to economic growth and stability in their own communities. A bank that is investing heavily in out-of-State business loans, tax-exempt securities, or mortgages contributes less to its 'com-

munity than one that is playing an active role in satisfying the credit needs of local businessmen, farmers, consumers, and governments. Clearly, so far as the community's convenience and needs are concerned, a merger involving the first bank would be far less objectionable from the public point of view than would a merger involving the second. Accordingly, a careful inventory of the extent of local and nonlocal credits in the bank's loan and investment portfolio is called for in order to clarify its role in community financing.

"In these ways—through surveys of community views, informed professional judgments, and a review of the record of the bank's participation in financing its community—reasonable bases for judgment can be established as to what the 'convenience and needs' of the community are and how well the existing institutions have met them. Against this must be weighed the record and assurances of the merging bank as to what it can and will supply. The final balancing of these considerations remains a matter of judgment but, with evidence before them of the type I have outlined, supervisory authorities can judge with a fair degree of assurance how well a proposed merger meets the 'convenience and needs' test." (Statement of George W. Mitchell, Member of the Board of Governors, Federal Reserve System, at the Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. p. 377 (1965)).

(c) *Federal Deposit Insurance Corporation.* The views of the Federal Deposit Insurance Corporation were expressed by its Chairman, K. A. Randall, as follows:

"Generally, in processing applications, it develops that the factor—effect of the proposed transaction upon competition—is most important. This factor, as you are aware, is also usually the most difficult to resolve. Closely allied with a determination on this factor is the factor 'convenience and needs of the community.' In many cases there is considerable overlapping of the two factors, and, in most of our merger proposals, these two factors weigh most heavily in our analysis, along with management and the condition of the bank. It has been the Corporation's policy that the weighing of the statutory factors must indicate a 'positive' rather than merely 'neutral' benefit to be obtained by the public as a result of the merger before it is approved. Positive benefits would be broader services being made available, correction of unsatisfactory condition or unsatisfactory management aspects of participating banks, or increased competition, or additional benefits to the community, or a combination of some or all of these benefits." (Written reply of K. A. Randall, Chairman, F. D. I. C. to written questions of Representative Patman, Hearings on S. 1698 before the Subcommittee on Domestic Finance of the Committee on Banking and Currency, House of Representatives, 89th Cong., 1st Sess. p. 897 (1965))

In the course of congressional debate, Senators and Representatives gave their views as to the broad scope of inquiry intended by the phrases "public interest" and "convenience and needs":

Senator Robertson:

"Clearly, the effect of the merger in meeting the convenience and needs of the community to be served is not limited to the immediate area within which the

bank may establish branches. In any metropolitan area the competition between suburban banks and downtown banks for the accounts of commuters is intense. Clearly, the great international banks with branches all around the world are not competing in the United States only within the limited area in the United States within which they may open their American branches. A New York City bank, which can only have branches in a limited area of New York State, is clearly competing through its branches in Paris and Rio de Janeiro and Bombay and Australia. It is also competing in Newark and Albany, in Boston and Richmond, in Chicago and Dallas, and in San Francisco and Los Angeles.

"The community to be served by the giant international loans of this kind of a bank is very different from the community to be served by the two small banks I mentioned earlier, and it is very different also from the community which the big New York bank serves through its automobile loans and special checking accounts at its branches in New York City. The effect of the merger on the public interest and on the convenience and needs of the community to be served must be measured in specific and realistic terms in the light of the kinds of business involved and the kinds of people being served. The banking agencies and the courts must be guided by the realities of the industrial, commercial, and financial worlds. They must look through theories and percentages and doctrines to the hard facts of life." 112 Cong. Rec. (daily ed.) 2542

Congressman Moorhead:

"First, let us consider the fact that banking is a regulated industry. In the banking industry the public interest is represented and protected by a regulating body. In mergers in such a situation the custom is

that the validity of a merger should be determined not exclusively by the competitive factors, but that the regulating body should also consider the public interest.

"The Supreme Court of the United States gave such an interpretation to the Interstate Commerce Act in *McLean Trucking Company v. U. S.*, 321 U. S. 67, 87 (1945) where the Court said:

> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy.

"On November 22d of last year, the Supreme Court cited and quoted McLean Trucking Co. in a per curiam decision, *Seaboard Air Line R. Co. v. U. S.*, 34 LW 3181. In this case, an ICC order approving a merger was set aside by a three judge district court on the ground that the Commission had not determined whether the merger violated section 7 of the Clayton Act. The Supreme Court reversed the lower court saying:

> By thus disposing of the case, the district court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition.

"In H. R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank merger 'despite the foreseeable injury to competition,' if 'the merger would be consistent with the public interest.'" 112 Cong. Rec. (daily ed.) 2340.

Congressman Ottinger:

> "The standard is clear and as adequately precise as is possible in an area of judgment where many factors play and there is a wide variety of situations to which the standard is to be applied. . . . It is very analogous to the public convenience and necessity standard included in Federal and virtually every State public utility regulatory statutes." 112 Cong. Rec. (daily ed.) 2349.

The Attorney General made an unsuccessful effort to restrict the scope of "convenience and needs" in a letter to Congressman Reuss dated January 5, 1966.[26] In that letter, the Attorney General commented adversely on provisions substantially identical to those appearing in the final Act and suggested a draft which would have explicitly limited "public interest" to "protecting the public against bank insolvency."

In the face of the Attorney General's draft, and with full knowledge that the banking industry, the bank regulatory agencies, and members of Congress were interpreting "convenience and needs" in the broadest possible way, Congress continued the phrase unchanged. There can be no doubt that Congress intended, to use the words of the Brief for the United States, "a general public interest standard" permitting "inquiry into all phases of the merger's possible impact."

The Department's Narrow Reading of the Act Would Not Make the Evaluation of Convenience and Needs a Judicial Function.

If it be admitted, for the sake of argument, that the Department of Justice is right and that Congress did intend to limit "convenience and needs" to floundering banks (Brief for the United States, p. 42), regional and national

26. H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 16-18.

competition (*id.* at 44), and new and important banking services (*ibid.*)—the function of weighing these factors is still administrative and not judicial:

(a) The Department admits that convenience and needs includes the problem of a bank which is "unable to render adequate service to the community" because it is "below the economic minimum size to attract capable and vigorous management personnel" or is held by "owners who insist on unrealistically conservative policies" (Brief for the United States, p. 43). Does the Department seriously contend that a District Court in a trial de novo—and this Court on appeal—should become embroiled in whether the conservative policies of a bank management are realistic or unrealistic; whether the management is capable and vigorous; if not, whether the bank is or is not of an economic size to attract personnel having these characteristics; and finally, whether the bank's services are adequate or inadequate, and by what standard?

(b) The Department admits that convenience and needs includes the promotion of competition in the regional or national market (Brief for the United States, p. 44). Courts are accustomed to deciding whether mergers may have *anti*competitive effects in any market. They have no experience in determining *pro*-competitive effects in other markets. And the weighing of pro-competitive effects in one market against the anticompetitive effects in another to determine the ultimate public interest is a legislative function.

(c) The Department admits that it is appropriate to consider the effect of a merger in "bringing to the community a new and important banking service." The Department sees "nothing beyond the limits of judicial competence in a determination whether a

claimed improvement in banking service is in fact new and important" (Brief for the United States, p. 44). The fallacy of delegating such determinations to the courts is shown by one of the services which the Department chose to illustrate what, in its view, is not new or important—credit cards. Even to the untutored eye, it should be plain that credit cards may have vast significance for commercial banking. They can be used nationally and internationally. They can be meshed with checking accounts to provide unified financial services. They may well be the first step toward the "checkless society" and the elimination of the physical handling of 12-14 billion checks a year.[27] Their evolution clearly is a matter of administrative concern, and just as clearly is not a matter for decision by the District Courts.

Nothing could better illustrate the errors in the Department's reading of the Act than its statement (Brief for the United States, p. 46) that the impact of the merger upon employment in the community is clearly beyond the scope of convenience and needs. This factor was one of those singled out for mention in the Committee Report on Senate

27. "But the vistas painted by banking specialists, computer manufacturers, and the American Telephone & Telegraph Co. point to an America not many years hence in which the housewife uses the telephone to pay cash in stores, make credit transactions, and pay bills at home. Such a vision may require a dramatic change in banking—perhaps creation of a giant 'financial utility' that controls the terminals for all transactions and holds credit information on every citizen.

"This utility may replace all individual credit card systems with a single 'universal card' for everyone, valid anywhere, and make credit references available instantaneously. It also would control communications facilities among banks and the clearing of payments. Payrolls would flow automatically from corporate accounts to individual accounts, and each morning corporate treasurers would see a computer's print-out of all the money that has flowed into it from banks during the night." "Next in banking: pay bills by phone," Business Week for November 13, 1965.

Bill 1698 (one of the numerous versions of the legislation). That report said:

> "In considering the convenience and needs of the community to be served, the committee expects the banking agencies, the Attorney General, and the courts to take into consideration the benefits to the banks and to their customers of sound, vigorous competition. At the same time, the committee expects the banking agencies, the Attorney General, and the courts to recognize the importance of sound and strong banks which can provide the banking services essential to the full development of the economy, *to full employment* and full production." (Emphasis added.) H. Rep. No. 1179, 89th Cong., 1st Sess., p. 5.[28]

The District Court's Interpretation of "Review de Novo" Is Correct.

The Department of Justice makes much of the statutory direction that the District Court shall "review de novo the issues presented." It argues that, by this direction, Congress intended the court to make an independent determination of the legality of the merger, rather than to review the banking agency's determination.

The court below rejected the Department's construction of the phrase "review de novo", because the Department's construction is inconsistent with the deference usually accorded to the expert judgment of administrative bodies and is also inconsistent with the constitutional separation of powers. The court gave to the phrase "review de novo" in the Bank Merger Act the same meaning with which it had been used in the *Smithfield* case (*First National Bank of Smithfield, North Carolina v. Saxon, supra*). In-

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28. For an example of the impact that progressive banks can have on attracting and encouraging the development of industry, see "Seeding Science-Based Industry," Business Review of Federal Reserve Bank of Philadelphia, May 1966, p. 3.

deed, the *Smithfield* case may have been the source of the phrase as used in the Bank Merger Act.[29]

The preceding sections of this brief have shown that the court below was right when it held that the Department's interpretation of "review de novo" is inconsistent with the Constitution. That is sufficient to dispose of the Department's appeal. However, in the following pages we will show that the District Court's interpretation of "review de novo" is fully consistent with the congressional intent.

The best way to find what Congress intended is to see what Congress did. The starting point for a determination of congressional intent in the Bank Merger Act of 1966 is to examine what changes Congress made in the statutory scheme after *Philadelphia National*.

In *Philadelphia National*, the defendant banks contended that the Comptroller's approval immunized the merger from challenge under the antitrust laws. This Court rejected the contention, holding that an approved merger was subject to attack in a suit under the Clayton Act and that in such a suit considerations of public interest under the 1960 Bank Merger Act were irrelevant because the legislature, in the Clayton Act, had established a policy proscribing anticompetitive mergers, "the benign and the malignant alike" (374 U. S. at 371). The reasons given by this Court for disregarding the Comptroller's decision were

29. In September 1965, the House Committee was considering a bill which would have provided for an appeal to a Court of Appeals under the substantial evidence rule. The Attorney General objected to this and suggested that the bill be amended to provide for a *trial* de novo in a District Court (letter dated September 24, 1965, H. Rep. No. 1221, 89th Cong., 2d Sess., p. 9). The Committee accepted the Attorney General's suggestion that the proceedings in court should be de novo, i.e., that the parties should be free to introduce new evidence, but it rejected his suggestion for an entirely new trial and provided instead that the court's function should be one of "review." The Attorney General himself proposed the phrase "review de novo" in a draft bill which he forwarded to the Committee in January 1966 (H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 16-18) —after the *Smithfield* decision was published.

that, although the Comptroller was required under the Bank Merger Act of 1960 to consider competitive effects: (a) he was not required to give this factor any particular weight, (b) he was not required to hold a hearing, and (c) there was no provision for judicial review (374 U. S. at 351). For these reasons, this Court likened the case to *California v. Federal Power Commission,* 369 U. S. 482 (1962), where there was a separate trial under the antitrust laws, and distinguished those cases where the court reviews the agency's finding of public interest, including its application of antitrust principles.[30]

The *Philadelphia National* decision, in effect, eliminated community convenience and needs as factors in adjudicating the legality of bank mergers where competition was impaired. In 1965, Senator Robertson, Chairman of the Senate Committee on Banking and Currency, introduced a bill to reverse this result. His purpose was to "call for consideration of public convenience and necessity and a final decision based on the public interest."[31]

Throughout the tortured course by which the Bank Merger Act finally evolved, proponents of legislative change strove to reinstate the factors of convenience and needs, and their opponents strove to preserve the paramountcy of antitrust considerations. The final result was a compromise. The proponents obtained a provision that the court must apply the same standards as the regulatory agency—including convenience and needs. This clearly makes relevant the policy considerations that were held irrelevant in *Philadelphia National Bank.* Their opponents obtained a

30. The most recent example is *Seaboard Air Line R. Co. v. U. S.,* 382 U. S. 154 (1965), where this Court said (pp. 156-157): "It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.'"

31. Hearings on S. 1698 before a Subcommittee of the Committee on Banking and Currency, United States Senate, 89th Cong., 1st Sess., p. 2.

provision that an anticompetitive merger may not be approved unless the public interest is clearly preponderant.

Insofar as the weight to be given to the administrative approval is concerned, the new legislation changed the three aspects of the 1960 statute to which this Court pointed in *Philadelphia National* when it held that the administrative approval under the 1960 Act should be disregarded.

> (a) The new act, unlike the old, specifies the weight which the agency must give to the factor of competition.
>
> (b) While it does not require the agency to hold a hearing [this aspect is discussed in more detail later in this brief], the new act provides for a hearing in the District Court and permits the regulatory agency to intervene, thus affording all interested parties an opportunity to be heard.
>
> (c) The new act, unlike the old, makes specific provision for judicial review during a period of 30 days following issuance of the agency's approval. After this period the merger is immune from attack under any antitrust laws other than Section 2 of the Sherman Act.

Since Congress changed the legislative features to which this Court pointed when it denied weight to the agency determination in *Philadelphia National*, the effect must be to change the result in *Philadelphia National* and to accord weight to the agency determination in the future.

That the legislators did so understand the significance of the new act is shown by the following statement in the "dissenting views" of Congressman Weltner, an opponent of the new act, printed as part of the House Report:[32]

> "*Yet these individuals* [the banking agencies] *may, under H. R. 12173, effectively repeal the antitrust*

32. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 29.

laws, because the courts must of necessity rely heavily upon agency 'expertise' concerning questions of fact, even where provision is made for de novo review. If these individuals conclude that the 'convenience and needs of the community to be served' clearly outweigh a substantial lessening of competition or a tendency toward monopoly, it is highly doubtful that a court will overrule even a substantially anticompetitive merger." (Emphasis in original.)

To bolster its position in this appeal, the Department of Justice points to statements by Representative Patman, Representative Reuss and Representative Multer to the effect that they expected the District Courts to adjudicate the legality of mergers without regard to the decision of the supervisory agency (Brief for the United States, pp. 35-36). As noted in footnote 22 on page 36 of the Brief for the United States, quotations can also be cited to precisely the opposite effect. The explanation offered by a commentator in the field of antitrust and trade regulation is that:

> "When legislation enacted by Congress represents a compromise of widely divergent views, the various factions often attempt ex post facto modification of the terms of the settlement. When the compromise bill comes up for final consideration, those factions will place on the record of the debate 'explanations' and 'interpretations' of the bill that will, not unnaturally, tend to bend the compromise language in the direction of the proposal originally favored by the speaker. As indicated in the analysis ATRR published earlier this year on the 1966 Bank Merger Act, the legislative history of that statute seems to follow such a pattern." (BNA Antitrust & Trade Regulation Report, January 24, 1967, p. B-1)

The Department's quotation from Representative Patman is particularly suspect for the reason noted by the court in the San Francisco bank merger case:

> "Counsel have largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he 'would be against it as a matter of principle.' (Cong. Rec. Feb. 8, 1966, p. 2357). Counsel's choice of makers of remarks is not very persuasive." (*U. S. v. Crocker-Anglo National Bank, et al., supra,* at page 83,152, fn. 3)

The District Court's Assignment of Burden of Proof Is Correct.

If, as the previous sections of this brief have shown, the court below was correct in holding that this is a review proceeding, it necessarily follows that the court below was also correct in assigning the burden of proof to the Department of Justice. The Banks have already established to the Comptroller's satisfaction that factors of community convenience and needs far outweigh any possible adverse effects on competition. Now it is up to the Department of Justice to show that the Comptroller's finding of public interest violates the statutory standards. "Moreover, the [Comptroller's] order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would oppose [it] carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission v. Hope Natural Gas Co.,* 320 U. S. 591, 602 (1944).

It likewise follows, under the *Smithfield* procedure of "review de novo," that the Department of Justice has the burden of coming forward with the evidence on all factual

issues—convenience and needs as well as competitive effects.[33]

The foregoing is dispositive of this issue, unless this Court should decide that the court below was incorrect and that a trial must ensue in which no weight whatever will be assigned to the agency determination. In that event, the Department of Justice, as the plaintiff, must bear the overall burden of persuasion to show the illegality of the merger. We do not understand the Department of Justice to dispute this.

The Department argues, however, that if there is to be a "trial de novo," convenience and needs is a statutory exception which must be proved by the Banks. The short answer to this is that convenience and needs is not an exception—the statute provides that it must be considered "in every case." Furthermore, traditional canons of statutory construction compel the conclusion that convenience and needs is a part of the plaintiff's affirmative case, rather than an exception. The authorities which support this proposition are set forth at length in the brief filed on behalf of the Houston banks in No. 914.

The Comptroller's Failure to Hold a Hearing Does Not Diminish the Weight to Be Given to His Decision.

The Department of Justice argues that it would be "anomalous" or "curious" to accord presumptive validity to the Comptroller's decision because it was made without a hearing (Brief for the United States, pp. 13, 37). The first answer to this argument is that the banking agencies have traditionally reached their determinations without

33. In the *Smithfield* case, the Court of Appeals said: ". . . the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action" (352 F. 2d at 272).

formal hearings; and this procedure, far from being criticized, has received widespread approval. The Eighth Circuit Court of Appeals, in *Northwest Bancorporation v. Board of Governors of the Federal Reserve System*, 303 F. 2d 832, 843 (8th Cir. 1962), quoted with approval the following passage from DAVIS, ADMINISTRATIVE LAW TREATISE:

> "Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. * * * The system may be one of the most successful, if not the most successful."

The Fourth Circuit Court of Appeals, in *Smithfield*, said:[34]

> "Furthermore, the uniform administrative practice of the Comptroller for a hundred years has sanctioned his present course. True, his own regulations had permitted an adversary hearing, but resort to these rules was entirely at his option. 12 C. F. R. § 4.8(d), (e) (1963)." (352 F. 2d at 270)

The District Court for the Southern District of New York in *Manufacturers Hanover* said:

> "We think that the lack of adversary hearings in this case is of no practical significance because the material evidentiary facts were before the Board, and they were, and still are, largely undisputed. Thus, there was nothing to hear but argument, and the Attorney General provided that in his written report." (240 F. Supp. at 885)

The Attorney General himself advised Congress in connection with the Bank Merger Act of 1966 that "there are important considerations that make the more summary

34. See also, *Webster Groves Trust Company v. Saxon*, opinion of the Eighth Circuit Court of Appeals dated December 14, 1966, reported in 35 L. W. 2348.

handling of merger applications particularly appropriate" (Letter of the Attorney General dated September 24, 1965, H. Rep. No. 1221, 89th Cong., 2d Sess., p. 10).

The reasons for not holding hearings are obvious. The decision to approve or disapprove a bank merger turns on the financial statements of the banks which are verified by the bank examiners, economic data which is a matter of public knowledge, and banking policy considerations which are part of the administrative expertise. These factors are rarely in dispute. The regulatory agency receives advisory opinions from the other agencies and the Attorney General as to the effect of the merger on competition and needs no hearing on this point. The other ingredients in the agency's determination, such as the strengths and weaknesses of the banks and their alternatives if the merger is disapproved must be treated in confidence. Disclosure may precipitate the untoward effects the merger is designed to prevent.[35] The Bank Merger Act of 1966 obviates the necessity for a public hearing in undisputed cases and postpones the hearing in disputed cases to the setting of a District Court, where confidential testimony can be fully protected.

The second answer to the Department's argument with respect to the lack of a hearing is that, in an appropriate case, a hearing can be, and is, accorded by the agency or ordered by the court.[36] The Comptroller held a full, evidentiary type hearing on his own motion in the San Francisco bank merger case, before the passage of the Bank Merger Act of 1966. Later, after the passage of the Act,

35. See colloquy between Senators Bennett and Robertson, agreeing that a public hearing may be "very dangerous" and may "defeat the whole thing." (Hearings on S. 1698 before a Subcommittee of the Committee on Banking and Currency, United States Senate, 89th Cong., 1st Sess., p. 215.)

36. Section 3 of the Bank Merger Act provides for publication of notice of any proposed merger, thus affording interested parties an opportunity to make their positions known to the banking agency before the agency acts on the merger application (Banks' Appendix 2b).

the California District Court ordered him to hold a second hearing to consider the implications of the new legislation. *U. S. v. Crocker-Anglo National Bank, supra,* at p. 83160. It is noteworthy that the Department of Justice declined to participate in either hearing, although invited to do so.

The Disagreement Between the Department of Justice and the Regulatory Agency Can Best Be Settled Under the District Court's Interpretation of the Statute.

The final argument in the Brief for the United States is that the bank regulatory agencies—or at least the Comptroller of the Currency—are disregarding the statutory standards and the intent of Congress by giving too little weight to the competitive factors in passing upon bank merger applications. The Comptroller has, an occasion, expressed the opposite view—that the Department gives too little weight to the public interest. This disagreement between two agencies of the government deeply concerned the court below, and the court's ruling establishes the only feasible method of reconciling their divergent views.

Reconciliation between the banking agencies and the Department will never be achieved by having each side try the case de novo, separately from the other. The traditional method is to prescribe precise standards to govern the agencies' decisions, to subject those decisions to judicial review at the request of the Department, and to set them aside if they violate the statutory standards or are otherwise arbitrary, capricious or unreasonable.

That is the scheme of the Bank Merger Act of 1966 as interpreted by the court below.

Conclusion: The Judgment Below Should Be Affirmed Without Remand.

The Department of Justice has staked its case on its contention that the Bank Merger Act requires a trial de novo. When the court below rejected this contention,

the Department made no effort to take an interlocutory appeal. When the Banks filed their motion for final judgment, the Department made no effort to preserve a right to remand in the event the judgment was upheld. At a hearing in chambers after the motion was filed, when the court reminded counsel for the Department that pretrial orders defining the issues are binding, counsel agreed that such was the case (Transcript of Hearing, December 12, 1966, p. 6-7). There can be no doubt that, if the District Court's interpretation of the Bank Merger Act is upheld, the judgment of the District Court should be affirmed without remand. The Brief for the United States does not suggest to the contrary.

Rule 41(b), under which the judgment was entered, provides that, unless the court in its order of dismissal otherwise specifies, the dismissal "operates as an adjudication upon the merits."[37] In this case, far from specifying otherwise, the court below ordered that the dismissal should be "with prejudice." In so doing, the court below was following this Court's direction in *Costello v. United States*, 365 U. S. 265, 286 (1961):

> "We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits—failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law—primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these

37. See *Safeway Stores v. Fannan*, 308 F. 2d 94, 99 (9th Cir. 1962).

grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where dismissals 'not provided for in this rule' also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. Thus a *sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court should be governed by the same policy. Although a *sua sponte* dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits."

II. If the Case Is Reversed and Remanded to the District Court, That Court Should Decide Whether to Stay the Merger Pendente Lite.

At the same time that it dismissed the case with prejudice, the court below ordered that the statutory stay of the merger under the Bank Merger Act be lifted, permitting the Banks to merge on and after January 18, 1967. On January 9, the Department of Justice applied to this Court for a stay of the merger pending appeal. On January 11, the Banks filed a memorandum (and supporting papers) in opposition to the Department's application. On January 16, Mr. Justice Brennan ordered the Banks to refrain from consummating their merger pending final determination of the appeal.

The Department has raised the question, what would be the status of the stay if this Court were to reverse and remand?

The Banks have found no precedent for this situation. They suggest that, upon remand, this Court should instruct the District Court to consider de novo the propriety of a further stay, basing such consideration on the motions and memoranda filed by the parties in this Court and such

supplementary evidence or testimony as the parties may submit. The reason for this suggestion is that the Banks' memorandum opposing the stay was grounded on a factual affidavit of their Presidents showing that the stay will not accomplish its purpose of maintaining the status quo and may destroy the merger.[38] The affidavit also showed that if the merger is consummated now and is later held to be illegal, the District Court will be able to grant effective relief through sale of branches and other saleable assets. There was no opportunity for this Court to hear argument on these factual issues or to give them detailed consideration. They should be considered by the District Court before any additional stay is granted.

Respectfully submitted,

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Dated: February 16, 1967.

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38. The Banks' memorandum opposing the stay, together with the supporting affidavit, is printed in the Banks' Appendix at 274b.

SUPPLEMENT.

A STATEMENT OF POLICY OF THE COMPTROLLER OF THE CURRENCY.

(102nd Annual Report to Congress, 1964)

The nation's industry and commerce are alive with change. If the banking industry is to serve their needs most effectively, it will have to match the initiative and imagination displayed elsewhere in the economy. The temper of the banking industry, and the energy with which new opportunities are created and pursued, will be critically affected by the attitudes of the public authorities. A negative or unreceptive outlook on the part of the regulator may dampen the initiative of banks and impede effective response to public demand for banking services and facilities.

For nearly four years, we have been engaged in an effort to broaden the opportunity for private initiative in the National Banking System, insofar as this could properly be done in the light of existing law and the public purpose to sustain and safeguard the viability of the banking system. In our 101st Annual Report to the Congress, we reviewed the changes that were instituted and those advocated with respect to the operating powers of National Banks. In this 102nd Annual Report, we shall examine the changes of policy and practice relating to the structure of the National Banking System.

The banking structure that is most ideal in terms of the public need will vary with the changing requirements for banking services and facilities. Like the operating powers of commercial banks, the structure of the banking industry must continuously be adapted to emerging demands and opportunities.

All of the forces of change which are at work throughout the economy, both domestic and international, influence the ideal banking structure to be sought. In our prosperous and vigorous society these changes are constant, far-reaching, and of compelling importance. Increases in personal income and population affect the volume of savings seeking productive uses. The growth of capital and advances in technology bring new products and new industries. These, in turn, often give rise to new communities and shifts of population. Population movements are further accelerated as income levels rise and permit the purchase of new homes. All of these factors have worked to produce demands for additional types of banking services and for banking facilities at new locations. The responses by the banks and the banking authorities to these new demands and opportunities have molded the evolution of the banking structure.

"Structure" is a term generally used to describe the composition and dispersion of an industry, geographically, by size of unit, and by the range of products manufactured and distributed. The structure of an industry is also affected by the ease with which new firms may enter and existing firms may expand. In all industries, structure is influenced by such factors as the location of the materials of production, the accessibility of markets, and production and demand conditions, as well as by unique factors such as the inventive process and enterpreneurial initiative Banking, however, and the other regulated industries, differ fundamentally from the unregulated industries in one significant respect—the influence of government on structure.

In the unregulated industries, the influence of government on structure is at a minimum. In these industries, the broadest scope is preserved for individual initiative; public controls are, for the most part, either indirect or peripheral. Except in unusual times such as war, it is rare in the unregulated industries to impose precise and positive rules of conduct for the individual. He is for-

bidden to engage in certain practices and certain governmental activities may indirectly affect the choices he makes, but beyond these limiting factors he has a free choice of entry and free discretion to select his own investment, production, and marketing policies. For example, although the total supply of money and credit is regulated, the government does not normally allocate their uses nor fix the prices of goods and services produced and sold. Collective bargaining is required, but wage rates are not fixed. Anticompetitive accretions of market power and deceptive practices are controlled, but there is no effort through public authority to select and enforce any exact set of competitive conditions.

This is in clear contrast to the public policies followed in the regulated industry of banking. In vertually every significant aspect, the structure of the banking industry is directly controlled by government. Entry into banking is restricted and the expansion of existing banks is closely regulated. No bank may be formed without a charter from the government. No bank may expand its size through the acquisition of new capital or the formation of new branches without the sanction of a public authority. No bank may expand through the acquisition of other banks without the prior approval of government.

Underlying this intercession of government in banking is a basic public policy that sets this industry clearly apart from others. The factor which distinguishes banking from other industries is the public concern to safeguard the viability of the banking system. This concern is founded upon the central role which banking performs in the economy, and the critical significance of public confidence in the banking system. The banking system provides the chief instrument of payment in the conduct of business and private transactions, and it represents one of the principal channels through which savings are directed to productive uses. In order that these functions may be performed effectively, there must be public confidence in the banking system.

Without such confidence, funds would not be deposited in banks nor would checks be accepted in payment of transactions, and the performance of the entire economy would be greatly impaired.

There are three basic forms of public control that affect the structure of the banking industry: (1) chartering controls; (2) branching controls; and (3) merger controls.

A. *Chartering Controls*

The imposition of entry controls through the requirement of a public charter represents the most fundamental structural regulation of the banking industry. In the unregulated industries, freedom of entry is preserved as the essential basis for the reliance placed on private initiative to exploit profitable opportunities for serving consumer demands, and generally to make certain that productive resources move to their best uses throughout the economy. It is recognized that free entry may result in the elimination of inefficient competitors, but this is regarded as a small price to pay for the public benefits of private initiative and innovation. Failures in banking, however, are considered to be of greater public consequence than failures in other industries because of the broad effects on confidence in the banking system and the severe incidence on individuals and small business firms. Entry restrictions have thus been adopted as one of the measures for preserving the viability of the banking system.

Since the existence of entry restrictions deprives the public of the full benefits of competition in meeting consumer demands, it becomes the responsibility of the regulatory authorities to make certain that entry controls are not so severely administered as to inhibit the provision of needed banking services and facilities. If the public authorities are insufficiently alert or sluggishly responsive to emerging requirements, artificial shortages may appear. This is precisely the situation which prevailed several years

ago as a result of postwar changes in the size and location of population and industry.

Shortages of supply normally create mounting pressures for market entry in a capital-rich and dynamic economy such as our own. This poses administrative problems where there is a public control of entry. As the saturation point is approached in a market under the pressure of new entry, it becomes increasingly difficult to make accurate estimates of need and potential profitability. Moreover, in order to sustain the viability of the banking system, it is desirable to preserve opportunities for new banks to grow to efficient size. For these reasons, a temporary halt may occasionally be required in the chartering of new banks in some markets, as occurred under the more responsive chartering policies of the past several years.

Some observers have been concerned lest the chartering of new banks should proceed so far as to increase the rate of bank failures, and it is worthwhile to consider how firm the safeguards against failure should be in the chartering of new banks. It must be remembered that bank entry is regulated not because there is a private right of existing banks to be protected against competition, but because there is a public concern to sustain the viability of the banking system. It can never be in the public interest to protect banks against competitors who are either more efficient or more responsive to public demands. There are, moreover, positive public benefits to be derived through the periodic introduction into the banking industry of new competitive forces with fresh ideas and fresh talents.

An absolute safeguard against bank failures resulting from new entry would require an absolute bar against entry, for any new competitor will have some effect on his rivals and will himself run the risk of failure. In order to reconcile the need to protect the viability of the banking system with the equally vital need to assure sufficient production of banking services, a unique combination of public policies has been adopted. Applications for entry are care-

fully screened in terms of public demand, potential profitability, and effects upon competitors. In order to assure the capability of new banks to operate efficiently and effectively, certain minimum capital requirements are imposed, and the competence of proposed management is appraised and approved by the regulatory authorities. The operating policies and practices of all banks are continuously supervised to sustain their solvency and liquidity. Finally, as an ultimate safeguard where failure does occur, a system of deposit insurance has been provided. Through these measures, confidence in the banking system is preserved without paralyzing the competitive forces. Thus, the banking industry is enabled to undertake the risks that are required in serving the demands of a thriving and flourishing economy.

The chartering of new banks represents, in many respects, the most delicate task which confronts the bank regulatory authorities. A new bank represents a new competitor, and a new competitor is rarely welcome in any industry. On the other hand, since bank charters are valuable because they are limited in supply, they are actively sought by competing applicants. The public authorities are thus subjected to intensive pressures both from those who seek charters and those who oppose them. Moreover, in reaching decisions on charter applications, there can be no absolute certainty of the fate that will befall new banks or their competitors.

Despite these difficulties of administering entry controls, banking must not be treated as a "closed" industry. Each new generation produces a new group of men and women of skill and ability seeking outlets for the use of their talents, and in our prosperous society there is a constant accumulation of capital in search of profitable employment. In some measure, these new productive resources will find their best uses in the banking industry, and the public will benefit by allowing them access to that industry.

B. *Branching Controls*

The second principal form of structure control is the regulation of branching. A bank may expand internally through the formation of *de novo* branches, or externally through the absorption of other banks by means of merger. Merger controls, however, raise a number of separate issues and will be discussed in the next section.

The policy issues confronted in branching are in many respects similar to those which appear in the chartering of new banks. Since the formation of a *de novo* branch introduces a new competitor into a market, the same questions arise of public need or convenience, potential profitability, and effects upon competitors. But inasmuch as branching increases the size of an individual bank, new issues also emerge concerning the potential for greater operating efficiency and for enlargement of the range of services offered to consumers.

There will be some circumstances in which a new branch will be able to serve public demand to better advantage than a new bank. Some banking markets can profitably support a new branch where a new bank could not prosper. A new branch may be able to bring to a community a broader range of services than could be efficiently provided by a newly chartered bank. Moreover, the abandonment of a branch will be less harmful—both to the parent bank and to the banking system—than the failure of a new bank; thus, where prospects are not immediately certain, or where expansion is based partially on anticipated growth in demand, branching might be the preferred course. The choice of whether to provide for bank expansion through new charters or through new branches is also affected by other considerations which are discussed in the next two sections.

Much of the recent demand for new branches, as has been true of that for new charters, stems from the growth and shifts of population and the creation and relocation of industries. Very commonly in recent years, for example,

the movement of population from urban to suburban areas has deprived urban banks of customers and created new demands in suburban areas. Moreover, the growth of new industries often gives rise to new working and residential communities with new needs for banking services and facilities. Through branching, a bank may "move with its customers" and retain its position in the industry. The broader the geographic dispersion of a bank's offices, the more readily may the deposits from surplus areas be put to effective use in areas where loan demand exceeds the deposits generated. Further, by increasing its size, branching may enable a bank to produce some services at lower cost. It may also enable a bank to spread its risks more effectively and thus allow engagement in lending activities that would not be feasible for a smaller bank. A larger bank, moreover, has a larger legal lending limit and so may serve certain classes of customers more effectively than smaller banks.

In the unregulated industries, the economies of scale actually realized, and the variety of services actually performed, are determined competitively. In banking, however, the regulatory authorities have the ultimate responsibility to choose the means of bank expansion best calculated to serve the public interest. Their decisions will inevitably affect the prices and range of products and services offered to consumers.

The authority to permit the formation of branches is much more severely restricted than the power of the regulatory authorities to allow the creation of new banks. These long-standing traditions with respect to branch banking have had a deep-seated and far-ranging effect upon the entire banking structure of the country, and upon the performance of the banking system. They have greatly enlarged the number of banks, hampered the growth of banks to most efficient size, inhibited the development of specialized services by many banks, and diminished the effectiveness and efficiency of the banking system in the

vital task of facilitating the movement of capital to its best uses throughout the Nation. In some degree, these limitations have been overcome through the solicitation of loans and deposits in areas beyond the powers to branch, and through the establishment of affiliates, satellites, or holding companies. These, however, represent generally inferior means for the expansion of banking operations.

There is the mistaken belief that broader authority to permit branching would lead to harmful effects upon competition in the banking industry. Greater power to allow the formation of branches, however, would merely add to the discretionary authority of the regulatory agencies. Equipped with a more extensive range of alternatives, the banking authorities would be in a better position to choose the precise means of bank expansion most suitable to serve the needs of individual banking markets, and most likely to provide the required services and facilities at the least cost. Indeed, the risk of monopoly power is greatest where the greatest reliance is placed on unit banking. Since new branches might be able to operate profitably in markets where new unit banks could not survive, the prohibition of branching would exclude potential competitive forces from these markets.

There is no consideration of the public interest which would justify an absolute withholding of the branching tool from the regulatory authorities. The only proper basis for the restriction of branching is the suitability of this means of bank expansion to serve emerging public demands in particular banking markets. Under this principle, the regulatory authorities should have the full discretion to authorize the formation of branches wherever they can serve the public interest to best advantage.

C. *Merger Controls*

The third means by which government influences the banking structure is through direct administrative control of mergers. In the unregulated industries mergers may be

freely undertaken, subject only to prosecution under the antitrust laws. In banking, however, mergers require the prior administrative approval of a regulatory authority, and the regulatory agencies in reaching their decisions apply a variety of statutory criteria relating to the banking and public consequences of proposed mergers.

The desire to merge is critically affected by the power to branch. Merger applications rarely appear in no-branch States because a merger under those conditions usually requires the closing of one of the merged banks. Thus, two tools of structure control are effectively lost where branching is prohibited, and needed bank expansion must take place almost entirely through new charters.

The public benefits which may be derived from mergers stem basically from the economies of large-scale enterprise, and the greater variety of services which larger firms may offer to consumers. These benefits will arise where increases in the scale of operations yield savings in costs, or where a broadening in the lines of production or the extension of operations to new markets permit greater dispersion of risks and thus allow the undertaking of ventures unsuitable for smaller firms. A larger and more broadly based bank may also be able to offer specialized services which are not profitable for smaller institutions, and should be able to move capital more efficiently from surplus to deficit areas. Moreover, the legal lending limits of banks require the presence of larger institutions to meet the needs of larger businesses most proficiently.

In our public policy for the unregulated industries, we have generally distinguished between the growth of firms through internal expansion and their growth through merger. Growth through merger has been viewed with greater public concern because it entails the elimination of competitors and, for this reason, merger limitations have been imposed through the antitrust laws. The direct administrative controls applied to bank mergers are also based in part upon the competitive effects of such mergers,

but, as we shall see, the banking authorities apply a variety of other public interest criteria in deciding bank merger cases. These criteria are specifically related to the fact that the banking structure is under direct public control.

There is some probability that growth through merger may have a more adverse effect on the liveliness of competition than growth through internal expansion. However, there are countervailing considerations. A merger may enable a firm to acquire plant, personnel, and market access not otherwise readily attainable, or attainable only at greater cost. More fundamentally, even though the intensity of competition may be adversely affected by growth through merger, merger may nevertheless produce benefits of larger-scale production which are in some degree passed on to consumers in the form of improved service or lower prices. The task of public policy is to allow those increases in the size of firms that are, on the whole, beneficial to consumers, while restricting those that are, on balance, harmful.

There are two reasons why merger may often be the preferred course of expansion in banking, even though in comparable circumstances reliance on internal growth may be more appropriate for the unregulated industries.

First, the banking authorities have a positive responsibility to see that the public convenience and need for banking services and facilities are met. In carrying out this responsibility, they do not have the authority to require the provision of service such as is found in the fully regulated industries like the "public utilities"; their choices are limited to the private proposals for bank expansion presented for their approval. If they find that a proposed merger will yield public benefits and they see no superior means for achieving these benefits either at hand or in clear prospect, they have a strong positive reason for approving the merger. In the unregulated industries, there is no public responsibility to fashion industry expansion according to the public need; reliance is placed on private initia-

tive and no public authority faces the problem of choosing the form or method of industry growth.

Second, in choosing the *best* means to serve the public convenience and need for banking services, the banking authorities must appraise the alternatives in terms of the effects on the solvency and liquidity of competing banks. Bank merger proposals are generally designed to provide new services to a community, to provide services at lower cost, or to enter new markets. The alternative means of achieving these purposes are new charters and *de novo* branching. If the existing banks in a market are poorly managed, financially weak, or unprogressive, such added competition may threaten their solvency or liquidity and merger may constitute the only effective means of bringing improved service to a community without posing a threat to bank viability.

In the unregulated industries, there is no public concern to safeguard individual firms against failure. Indeed, in these industries freedom to compete and to eliminate less efficient rivals is essential to the reliance placed on private initiative to serve consumer demands. It is therefore appropriate in the freely competitive industries to impose more severe restrictions on growth through merger than are applied to banking.

Bank mergers have sometimes been opposed on the ground that, although they may improve service for some classes of consumers, they may do so at the expense of others. Some classes of consumers, however, have needs which only larger banks can serve efficiently. If other classes of consumers are disadvantaged by a merger, a new opportunity is presented to competing banks and the banking authorities may respond by authorizing new charters or new branches. In this way, the needs of *all* classes of bank customers may be served most efficiently and most effectively.

The Bank Merger Act of 1960 provided for direct administrative control of bank mergers by the banking au-

thorities, and established broad public interest standards to guide the administration of these controls. In addition to the "effect of the transaction on competition (including any tendency toward monopoly)," the banking agencies are required to consider the financial history and condition of each of the banks involved, the adequacy of their capital structures, their future earnings prospects, the general character of their management and, most significantly, "the convenience and needs of the community to be served." Mergers are to be approved only where, after considering all of these factors, the transaction is found to be "in the public interest." Since the passage of the Bank Merger Act, however, two Supreme Court decisions have subjected bank mergers to the antitrust laws. This has given rise to ambiguities of policy and conflicts of purpose.

The problems are both philosophic and procedural. There is no serious dispute about the desirability of applying antitrust principles to the unregulated industries. Since in those industries primary reliance is placed on individual initiative and private enterprise to meet consumer demands, there are justifiable reasons for preserving freedom of entry and restricting the acquisition of market power in order to enable the competitive forces to function. In banking, however, entry and expansion are under direct public control. The competitive forces are purposefully restricted in order to safeguard the viability of the banking system, and an effort to apply conventional antitrust principles in these circumstances is almost certain to conflict with bank regulatory objectives.

This is well demonstrated by the difficulties that have been encountered under the Bank Merger Act since the *Philadelphia* and *Lexington* decisions brought bank mergers under the antitrust laws. Although the banking agencies must continue to reach their decisions according to the broader public interest standards set forth in the Bank Merger Act, their decisions are now subject to attack in

the courts under the narrower standards of the antitrust laws.

This impasse can be clearly resolved only by exempting bank mergers from the antitrust laws completely as has been done in other regulated industries, or by subjecting such mergers to the full application of those laws. If this latter course is chosen, the Bank Merger Act should be repealed. There would seem to be no valid reason for subjecting banks to more onerous premerger requirements than apply in the unregulated industries if bank mergers are to be subject to attack under the antitrust laws. More fundamentally, if it is to be public policy to apply conventional antitrust concepts to banking, it logically follows that bank entry and bank branching should also be free of direct public control. The least satisfactory course, is the present one of entrusting regulatory powers to the banking agencies and judging the exercise of those powers on the assumption that the competitive forces are to be fully preserved and fully operative. It should be observed, however, that a decision to move toward free bank entry and expansion raises questions which go beyond the problems of banking structure. It is highly doubtful that bank operating practices could be effectively supervised, and the viability of the banking system sustained, without some form of public control over the banking structure.

There is one intermediate course through which a reconciliation might be achieved between the Bank Merger Act and the antitrust laws without a statutory change. The courts, in antitrust cases involving bank mergers, could take cognizance of the fact that banking competition is restricted through public regulation, and that bank mergers receive prior administrative approval from a public authority according to broad public interest standards which transcend purely competitive considerations. This approach would not be as clear-cut as the other alternatives we have presented, and would undoubtedly leave large areas of uncertainty for long periods. Nevertheless, if in

bank merger cases the courts considered the unique competitive conditions which prevail in the regulated industry of banking, there would be a greater likelihood that the antitrust criteria developed principally with the unregulated industries in mind could be adapted to banking without impairing the effectiveness of bank regulation. An effort to test this approach for accommodating these two basic strands of our public policy was recently undertaken by the Comptroller of the Currency as an intervening defendant in an antitrust action relating to the merger of the Mercantile Trust Company N.A. and the Security Trust Company, both of St. Louis.

There is one administrative procedure under the Bank Merger Act which should be modified if that Act is to remain in force. At present, the banking agencies not directly involved in a merger decision are required to submit advisory opinions on the "competitive factor" to the responsible agency. Since this factor comprises only one of the seven considerations required to be taken into account, the advisory opinions do not represent a judgment on the desirability of a merger. Nevertheless, differences between the advisory opinions and the decisions on mergers have often been falsely cited as evidence of differences in merger policy among the banking agencies. Moreover, five years of experience under the Bank Merger Act have demonstrated that the advisory opinions of the banking agencies not faced with the responsibility of decision are ordinarily routine and rarely present facts or ideas unknown to the responsible agency. There seems to be no proper reason for continuing this procedure.

Retention of the Justice Department advisory opinions may appear to have greater justification. However, the role of the Justice Department in bank merger cases will ultimately rest on the resolution of the more fundamental issue of the proper applicability of the antitrust laws to the regulated industry of banking.